

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ELECTRONICALLY FILED  
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DATE FILED: 7/10/17

ALFRED CRUZ,

Plaintiff,

- against -

SAINT BARNABAS HOSPITAL,

Defendant.

**ORDER**

16 Civ. 5063 (ER)

Ramos, D.J.:

On June 29, 2016, Alfred Cruz (“Plaintiff”) filed the Complaint against Saint Barnabas Hospital (“Defendant”), alleging employment discrimination. Doc 1. On December 23, 2016, Defendant requested leave to move to dismiss the Complaint for failure to properly serve the Summons and Complaint within 90 days of filing as required by the Federal Rule of Civil Procedure 4(m). Doc. 6. The Court held a conference on January 5, 2017 during which the Court directed Plaintiff to properly serve Defendant by February 4, 2017.

By letter dated February 27, 2017, Defendant again requested leave to file a motion to dismiss the action under Rule 4(m). Doc. 18. Defendant stated that Plaintiff failed to properly serve the Summons and Complaint under Rule 4(h), which does not authorize service of the Summons and Complaint by regular mail. *Id.* Defendant further asserted that Plaintiff did not serve two copies of a statement of service by mail and acknowledgement of receipt form as required by New York Civil Practice Law and Rules § 312-a. *Id.* Plaintiff responded on March 8, 2017, claiming that he effectuated proper service under Rule 5(b)(1) as he electronically served Defendant’s counsel with a copy of the Summons and Complaint, and provided the

Defendant a courtesy copy soon thereafter. Doc. 20. On that same day, he also filed a motion to amend the Complaint. Doc. 21.


Service under Rule 5 is only allowed for pleadings “subsequent to the original complaint” that do not assert any “new or additional claims for relief.” Fed. R. Civ. P. 5(a); *see e.g.*, *National Development Co. v. Triad Holding Corp.*, 131 F.R.D. 408, 413 (S.D.N.Y. 1990) (where “Supplemental Complaint” included the assertion of a new claim, plaintiff was required by Rule 5(a) to serve it in the same manner as a summons, under Rule 4). Therefore, Plaintiff must serve the Summons and Complaint under Rule 4. Under Plaintiff’s own admission, he served the Summons and Complaint under Rule 5, not Rule 4. *See* Doc. 20.

Under Rule 4(m), if a defendant is not served within 90 days after the complaint is filed, the court “must dismiss the action without prejudice against that defendant or order that service be made within a specified time.” Fed. R. Civ. P. 4(m). The Court had already granted additional time to properly serve the Summons and Complaint, and Plaintiff failed to properly serve Defendant by that deadline.

Accordingly, it is hereby ordered that the above-captioned action is dismissed without prejudice. The Clerk of the Court is respectfully directed to terminate the pending motions, Docs. 6, 21, and to close this case.

It is SO ORDERED.

Dated: July 7, 2017  
New York, New York

  
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Edgardo Ramos, U.S.D.J.